A

TASJA SDN BHD

v.

GOLDEN APPROACH SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
HASAN LAH JCA
SULAIMAN DAUD JCA
[CIVIL APPEAL NO: W-02-800-2007]

C

21 MAY 2010

CIVIL PROCEDURE: *Striking out - Claim - Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d) - Whether plaintiff's claim time barred - Limitation Act 1953, s. 6(1)(a) - Whether s. 4 Limitation Act 1953 relevant for defendant's application*

D

CIVIL PROCEDURE: *Pleadings - Statement of claim - Issues not pleaded in statement of claim - Whether could not be raised - Whether any defect or omission could not be made good by affidavit evidence - Whether plaintiff bound by pleadings*

E

The defendant, by a letter of acceptance dated 12 November 1996, awarded the construction works for a project ('the project') to the plaintiff. The defendant had also appointed Weathered & Howe (Malaysia) Sdn Bhd as its engineer ('the engineer') for the

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purposes of the contract responsible for the overall supervision and direction of the works for the project. On 6 February 1998, the plaintiff and the defendant signed the contract agreement ('the Construction Contract') whereby cl. 47 of the Construction Contract provided that upon the submission of claims by the

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contractor (the plaintiff), the engineer would make a fair valuation of the works properly executed by the contractor and within 14 days from the date of any such valuation the engineer would issue an Interim Valuation Certificate stating the amount due to the contractor from the employer (the defendant). The engineer

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issued five Interim Valuation Certificates in relation to the works executed by the plaintiff. In para. 7 of its statement of claim, the plaintiff alleged that the defendant had not paid an amount of RM1,316,783.76 from the amount certified by the engineer. On 20 May 1998, the plaintiff and the defendant entered into an

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agreement for mutual termination of the Construction Contract

('the Termination Agreement'). On 7 August 1998, the plaintiff submitted its final claim for RM1,895,905.02. On 31 May 2005, the plaintiff filed a writ and statement of claim against the defendant claiming for a total sum of RM3,212,688.76. On 12 August 2005, by a summons-in-chambers, the defendant applied for the plaintiff's statement of claim to be struck out under O. 18 r. 19(1)(b), (c) or (d) of the Rules of the High Court 1980 on the ground that the plaintiff's claim for the amounts of RM1,316,783.76 and RM1,895,905.02 was time barred under s. 6(1)(a) of the Limitation Act 1953. The plaintiff, in opposing the defendant's application, asserted that its claim was not time barred because time had commenced from the date the final account was finalized which was after 2001. On 3 April 2006, the deputy registrar allowed the defendant's application and struck out the plaintiff's statement of claim with costs. On appeal to the judge-in-chambers, the learned judge dismissed the plaintiff's appeal and held that the plaintiff's claim which was based on the Interim Valuation Certificates and the letter dated 7 August 1998 was time barred. The plaintiff, before this court, submitted that (i) the learned judge had misdirected herself when she proceeded to examine only the statement of claim and rejected the contention that the claim was based on the Termination Agreement as advanced by the plaintiff *vide* its affidavits; (ii) the defendant had failed to plead a defence of limitation as no defence had been filed in this case, thus there was non-compliance with s. 4 of the Limitation Act 1953.

Held (dismissing the appeal)
Per Hasan Lah JCA delivering the judgment of the court:

(1) It was clear from the statement of claim that the plaintiff based its claim on the Construction Contract and not the Termination Agreement. As such, the plaintiff was bound by the pleadings and it could not raise issues not pleaded in its statement of claim (*Lee Ah Chor v. Southern Bank Bhd*). The plaintiff herein in its affidavits stated that the sum of money mentioned in the statement of claim was still claimable pursuant to the Termination Agreement. The law, however, is clear that any defect or omission in the statement of claim could not be made good by affidavit evidence. (paras 18 & 22)

(2) Under cl. 47(d) of the Construction Contract, payments were to be made within 30 days of the issue of the Interim Valuation Certificate. The fifth Interim Valuation Certificate was issued on 12 February 1998 which meant that the plaintiff must file the claim against the defendant by 13 March 2004 as s. 6(1)(a) of the Limitation Act provides a six year limitation period for contractual claims. With regard to the plaintiff's claim for RM1,895,905.02 as stated in its letter dated 7 August 1998 the six year period ended on 8 August 2004. The plaintiff's claim was filed on 31 May 2005. The plaintiff was clearly out of time because for the purpose of limitation, time began to run from the earliest time at which the plaintiff could have brought an action (*Nik Che Kok v. Public Bank Bhd*). (para 19)

(3) Section 4 of the Limitation Act was not relevant for the purpose of the defendant's application as the defendant was applying to strike out the plaintiff's claim under O. 18 r. 19 of the Rules of the High Court and as such the defendant did not have to file its defence at that stage (*Kuan Hip Peng v. Yap Yin & Anor*). (para 20)

(4) The learned judge was correct in her decision in not considering the explanations made by the plaintiff in its affidavits in support of the argument that the claim was not time barred. There was no merit in the plaintiff's appeal. There was no appealable error in the decision of the learned judge. (para 23)

Bahasa Malaysia *Translation Of Headnotes*

Defendan, melalui surat penerimaan bertarikh 12 November 1996, telah memberi kerja-kerja pembinaan bagi satu projek ('projek') kepada plaintif. Defendan juga telah melantik Weathered & Howe (Malaysia) Sdn Bhd sebagai juruteranya ('jurutera') bagi tujuan kontrak yang bertanggungjawab untuk penyeliaan keseluruhan dan arahan-arahan kerja projek. Pada 6 Februari 1998, plaintif dan defendan menandatangani kontrak persetujuaan ('Kontrak Pembinaan') di mana kl. 47 Kontrak Pembinaan menyediakan bahawa atas penyerahan tuntutan-tuntuan oleh kontraktor ('plaintif'), jurutera akan membuat satu penilaian yang adil mengenai kerja-kerja yang dilaksanakan dengan betul dan dalam masa 14 hari dari tarikh mana-mana penilaian jurutera

mengeluarkan Laporan Penilaian Sementara menyatakan jumlah yang kena dibayar kepada kontraktor dari majikan (defendan). Jurutera mengeluarkan lima Laporan Penilaian Sementara berhubungan kerja-kerja yang dilaksanakan oleh plaintif. Dalam perenggan 7 penyataan tuntutan, plaintif mendakwa bahawa defendan tidak membayar jumlah RM1,316,783.76 dari jumlah yang disahkan oleh jurutera. Pada 20 Mei 1998, plaintif dan defendan memasuki satu perjanjian penamatan bersama Kontrak Pembinaan ('Perjanjian Penamatan'). Pada 7 Ogos 1998, plaintif menyerahkan tuntutan akhir yang berjumlah RM1,895,905.02. Pada 31 Mei 2005, plaintif memfailkan writ dan pernyataan tuntutan terhadap defendan menuntut jumlah sepenuhnya RM3,212,688.76. Pada 12 Ogos 2005, melalui saman-dalam-kamar defendan telah memohon supaya pernyataan tuntutan plaintif ditolak di bawah A. 18 k. 19(1)(b), (c) atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 atas alasan tuntutan plaintif untuk jumlah-jumlah RM1,316,783.76 dan RM1,895,905.02 dihadkan oleh masa di bawah s. 6(1)(a) Akta Had Masa 1953. Plaintif, dalam menentang permohonan defendan, menegaskan bahawa tuntutannya tidak dihadkan oleh masa kerana masa telah bermula dari tarikh akaun muktamad telah dimuktamadkan iaitu selepas tahun 2001. Pada 3 April 2006, Timbalan Pendaftar membenarkan permohonan defendan dan menolak pernyataan tuntutan plaintif dengan kos. Melalui rayuan ke hakim-dalam-kamar, yang arif hakim telah menolak rayuan plaintif dan memutuskan bahawa tuntutan plaintif yang berdasarkan Laporan Penilaian Sementara dan surat bertarikh 7 Ogos 1998 adalah dihadkan oleh masa. Plaintif, di hadapan mahkamah ini, berhujah bahawa (i) yang arif hakim telah tersalah arah apabila beliau membuat pemeriksaan hanya atas pernyataan tuntutan dan menolak dakwaan tuntutan berdasarkan perjanjian penamatan seperti yang dimajukan oleh plaintif melalui afidavit-afidavitnya; (ii) defendan gagal memplid pembelaan had masa kerana tiada pembelaan telah difailkan di dalam kes ini, oleh itu terdapat ketakpatuhan dengan s. 4 Akta Had Masa 1953.

Diputuskan (menolak rayuan)
Oleh Hasan Lah HMR menyampaikan penghakiman mahkamah:

(1) Adalah jelas dari pernyataan tuntutan bahawa tuntutan plaintif berdasarkan Kontrak Pembinaan dan bukan Perjanjian Penamatan. Dengan itu, plaintif adalah terikat dengan pliding-

pliding dan tidak boleh membangkitkan isu-isu yang tidak diplidkan di dalam pernyataan tuntutan (*Lee Ah Chor v. Southern Bank Bhd*). Plaintif di dalam afidavitnya menyatakan bahawa jumlah wang yang disebut di dalam pernyataan tuntutan masih boleh dituntut mengikut Perjanjian Penamatan. Walaubagaimanapun, undang-undang adalah jelas bahawa apa-apa kecacatan atau peninggalan di dalam pernyataan tuntutan tidak boleh diperbaiki melalui keterangan afidavit.

(2) Di bawah kl. 47(d) Kontrak Pembinaan bayaran-bayaran mesti dibuat dalam masa 30 hari Laporan Penilaian Sementara dikeluarkan. Laporan Penilaian Sementara kelima dikeluarkan pada 12 Februari 1998 dan itu bermakna bahawa plaintif mesti memfailkan tuntutan terhadap defendan sebelum 13 Mac 2004 kerana s. 6(1)(a) Akta Had Masa memperuntukkan tempoh had masa enam tahun bagi tuntutan-tuntutan kontraktual. Mengenai dakwaan plaintif untuk jumlah RM1,895,905.02 seperti yang dinyatakan di dalam surat bertarikh 7 Ogos 1998, tempoh enam tahun berakhir padad 8 Ogos 2004. Tuntutan plaintif difailkan pada 31 Mei 2005. Plaintif dengan jelas di luar had masa kerana bagi tujuan had masa, masa bermula dari waktu yang paling awal di mana plaintif boleh memulakan tindakan (*Nik Che Kok v. Public Bank Bhd*).

(3) Seksyen 4 Akta Had Masa tidak relevan bagi tujuan permohonan defendan kerana defendan memohon untuk menolak tuntutan plaintif di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi dan dengan itu defendan tidak perlu memfailkan pembelaannya pada peringkat itu (*Kuan Hip Peng v. Yap Yin & Anor*)

(4) Yang arif hakim telah membuat keputusan yang betul apabila tidak mempertimbangkan penjelasan yang dibuat oleh plaintif di dalam afidavit-afidavit yang menyokong hujahan yang tuntutan tidak dihadkan oleh masa. Tiada merit di dalam rayuan plaintif. Tiada kesilapan yang boleh dirayu di dalam keputusan yang arif hakim.

Case(s) referred to:

Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1897] CLJ (Rep) 102 SC ***(refd)***

Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors & Other Cases [1983] 2 CLJ 68; [1983] CLJ (Rep) 165 FC ***(refd)***

Kuan Hip Peng v. Yap Yin & Anor [1964] 1 LNS 69 FC ***(refd)***

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***

Nik Che Kok v. Public Bank Bhd [2001] 2 CLJ 157 CA ***(refd)***

United Malayan Banking Corp Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors [1982] CLJ 547; [1982] CLJ (Rep) 358 FC ***(refd)***

Legislation referred to:

Civil Law Ordinance 1956, s. 7(5)
Limitation Act 1953, ss. 4, 6(1)(a)
Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d)
Rules of the Supreme Court 1957, O. 25 r. 4

For the appellants - Gobind Singh Deo; (Marisa Regina with him); M/s Aris Rizal Christopher Fernando & Co

For the respondents - Wong Kian Kheong (Karen Lee with him); M/s Cheong Wan Meng & Van Buerle

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S7-22-628-2005]

Reported by Suhainah Wahiduddin

JUDGMENT

Hasan Lah JCA:

[1] On 13 August 2009 we dismissed this appeal with costs. We now give the grounds for our decision.

[2] In this judgment the parties are referred to as "the plaintiff" and "the defendant" just as they were described in the writ of summons dated 22 June 2005.

[3] By a letter of acceptance dated 12 November 1996 the defendant awarded the construction works for a project known as "Proposed Construction And Completion Of Stage 2A Civil Infrastructural Works Including Earthworks, Roads, Drainage And Ancillary Works For Proposed Diamond Creeks Country Retreat On Lot 9887 & 9888, Mukim Of Ulu Bernam, Daerah Tanjong Malim, Perak (hereinafter referred to as "the project") at a price

of RM14,925,754.15 with a completion period of 52 weeks to the plaintiff. It was provided in that letter of acceptance that pending the signing of a formal contract agreement, the letter of acceptance would constitute a legal and binding contract. It was also stated in the letter of acceptance that the plaintiff would take possession of the site on 18 November 1996 and the date for the completion of the whole works would be 18 November 1997.

[4] The defendant also had appointed Weathered & Howe (Malaysia) Sdn Bhd as its engineer ("the engineer") for the purposes of the contract who was responsible for the overall supervision and direction of the works for the project.

[5] On 6 February 1998 the plaintiff and the defendant signed the contract agreement ("the construction contract"). Clause 47 of the construction contract provided that upon the submission of claims by the contractor (the plaintiff) the engineer would make a fair valuation of the works properly executed by the contractor and within 14 days from the date of any such valuation the engineer would issue an interim valuation certificate stating the amount due to the contractor from the employer (the defendant). It was further provided that within 30 days of the issue of any such interim valuation certificate as aforesaid the employer would make a payment to the contractor of the amount certified as due to the contractor in the said certificate.

[6] The engineer issued five interim valuation certificates in relation to the works executed by the plaintiff and they are as follows:

(a) 20 March 1997 - Interim Valuation Certificate No. 1 for RM464,000;

(b) 29 April 1997 - Interim Valuation Certificate No. 2 for RM262,300;

(c) 10 September 1997 - Interim Valuation Certificate No. 3 for RM1,689,800;

(d) 6 November 1997 - Interim Valuation Certificate No. 4 for RM1,493,600;

(e) 12 February 1998 - Interim Valuation Certificate No. 5 for RM882,200

[7] In para. 7 of its statement of claim the plaintiff alleged that the defendant had not paid an amount of RM1,316,783.76 from the amount certified by the engineer in the interim valuation certificates and the claim is as follows:

Butir-Butir		
Nilai kerja disahkan	RM3,795,241.85	
Nilai bahan di tapak projek	RM82,802.54	
Variasi	RM202,458.37	
	RM4,080,502.76	
Tolak bayaran dilakukan	RM1,726,300.00	
Tolak nilai tanah dikontra	RM1,037,419.00	
	RM2,763,719.00	
	RM1,316,783.76	

[8] On 20 May 1998 the plaintiff and the defendant entered into an agreement for mutual termination of the construction contract ("the termination agreement"). Clause 2 of the termination agreement provided that all satisfactorily completed work would be inspected and valued by final measurement on site. Clause 3 provided that final account would be finalised and established within one month from completion of final site measurement and submission of full particulars/documents supporting the claims made. Clause 5 provided that mode of payment for all outstanding payments and monies due and owing to the plaintiff derived from the final account would be by monthly instalments of RM100,000 and would commence from 1 February 1998. Clause 18 provided that the plaintiff would contra bungalow lots in Phase 1, Diamond Creek Country Retreat *in lieu* of payment to a total amount of RM1,000,000. The sales and purchase agreement for the bungalow lots would be executed within 14 days upon the signing of the termination agreement.

[9] On 7 August 1998 the plaintiff submitted its final claim for RM1,895,905.02 (p. 163 of the Appeal Record). The plaintiff's final claim had been summarised in para. 10 of its statement of claim as follows:

A	Butir-Butir	
	Nilai kerja dilakukan dalam projek	RM6,222.983.26
	Nilai bahan dibekalkan	RM 249.956.77
B	Nilai Variasi	RM 214,854.99
	Tolak jumlah yang disahkan dengan sijil	RM 4,791,900.00
	Jumlah	RM 1,895,905.02

[10] On 31 May 2005 the plaintiff filed a writ and statement of claim against the defendant claiming for a total sum of C RM3,212,688.76 (ie, RM1,316,783.76 + RM1,895,905.02), interests and costs.

[11] On 12 August 2005 by a summons in chambers the defendant applied for the plaintiff's statement of claim to be struck D out under O. 18 r. 19(1)(b), (c) or (d) of the Rules of the High Court 1980 on the ground that the plaintiff's claim for the amounts of RM1,316,783.76 and RM1,895,905.02 was time-barred under s. 6(1)(a) of the Limitation Act.

E **[12]** In its affidavit affirmed by How Pooi Gen on 14 October 2005 the plaintiff, in opposing the defendant's application, asserted that its claim was not time-barred because time commenced from the date the final account was finalised which was after 2001. The payment by contra bungalow lots was only completed after F the year of 2000. In the meantime the defendant was wound up by the High Court and in 2005 the Court of Appeal allowed the defendant's appeal against the order. In reply to the plaintiff's averment in relation to the contra payment the defendant asserted that the contra payment was completed on 8 December 1998 and G not as alleged by the plaintiff.

[13] On 3 April 2006 the learned deputy registrar allowed the defendant's application and struck out the plaintiff's statement of claim with costs.

H **[14]** On appeal to judge in chambers on 2 August 2007 the learned judge dismissed the plaintiff's appeal with costs. The learned judge held that the plaintiff's claim which was based on the interim valuation certificates and the letter dated 7 August 1998 was time-barred. In her decision the learned judge relied on I the decision of the Federal Court in *Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors & Other Cases* [1983] 2 CLJ 68;

[1983] CLJ (Rep) 165. The learned judge rejected the plaintiff's contention that the claim was not time-barred because the claim was based on the termination agreement on the ground that the plaintiff's claim was not based on the termination agreement. A

[15] Before us, learned counsel for the plaintiff submitted that the learned judge misdirected herself when she proceeded to examine only the statement of claim and rejected the contention that the claim was based on the termination agreement as advanced by the plaintiff *vide* its affidavits. Learned counsel further submitted that the case of *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1897] CLJ (Rep) 102 which was relied upon by the learned judge could be distinguished on the ground that *Gimstern* case was not a case in which an application was made under O. 18 r. 19(1) of the Rules of the High Court 1980 to strike out and further it had no relation to a defence of limitation. The pleadings, in that case, had closed. B C D

[16] Learned counsel for the plaintiff also submitted that the defendant had failed to plead a defence of limitation as no defence had been filed in this case. The defendant did not comply with s. 4 of the Limitation Act 1953 which stated that a defence of limitation must be expressly pleaded as a defence. E

[17] Learned counsel for the plaintiff contended that the plaintiff had raised in its affidavits a reasonable explanation that the sum of money mentioned in the statement of claim was still claimable pursuant to the termination agreement which expressly provided that payment for all outstanding payments would be on monthly instalments of RM100,000 commencing from 1 February 1998. Learned counsel for the plaintiff further submitted that the learned judge ought to have held that this was not a clearly "obviously unsustainable" case. In view of the explanation given by the plaintiff in its affidavits this was clearly a case where the claim could have been saved by amendment. F G

[18] It was clear from the statement of claim that the plaintiff based its claim on the construction contract and not the termination agreement. As such the plaintiff was bound by the pleadings and it could not raise issues not pleaded in its statement of claim (see *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239). H I

[19] Under cl. 47(d) of the construction contract payments were to be made within 30 days of the issue of the interim valuation certificate. The 5th interim valuation certificate was issued on 12 February 1998 which means the plaintiff must file the claim against the defendant by 13 March 2004 as s. 6(1)(a) of the Limitation Act provides a six-year limitation period for contractual claims. With regard to the plaintiff's claim for RM1,895,905.02 as stated in its letter dated 7 August 1998 the six-year period ended on 8 August 2004. The plaintiff's claim was filed on 31 May 2005. The plaintiff was clearly out of time because for the purpose of limitation, time began to run from the earliest time at which the plaintiff could have brought an action (see *Nik Che Kok v. Public Bank Bhd* [2001] 2 CLJ 157).

[20] With regard to the plaintiff's contention that the defendant did not comply with s. 4 of the Limitation Act which requires a defence of limitation to be expressly pleaded as a defence we agreed with the submission of learned counsel for the defendant that that provision was not relevant for the purpose of the defendant's application as the defendant was applying to strike out the plaintiff's claim under O. 18 r. 19 of the Rules of the High Court and as such the defendant did not have to file its defence at that stage (see *Kuan Hip Peng v. Yap Yin & Anor* [1964] 1 LNS 69. In that case the writ was issued four days after the expiry of the period of three years prescribed in s. 7(5) of the Civil Law Ordinance 1956. No defence was filed but the respondent applied by summons for the writ to be struck out under O. 25 r. 4 of RSC 1957 on the ground that the claim endorsed on it was frivolous and vexatious and an abuse of the process of the court. The trial judge made an order dismissing the suit and the appellant appealed. The grounds of appeal were that the application to strike out was premature as it was made before the defence was filed and in particular that no such order should have been made on the application of a defendant who wished to take advantage of a statute of limitation. The Federal Court, *inter alia*, held that there was nothing in the wording of O. 25 r. 4 RSC 1957 to show that a defendant who wishes to proceed under it must first file his defence.

[21] In *Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Other Cases* [1983] 2 CLJ 68; [1983] CLJ (Rep) 165 the plaintiffs filed suits against the defendants alleging that their dismissal as penghulus was unconstitutional and unlawful. The defendants did

not file a defence but applied for the writ to be struck out as the actions were statute-barred by the Public Authorities Protection Act 1948. The writs were struck out and the plaintiffs appealed. The Federal Court, in dismissing the appeal, held *inter alia* that where it was clear that the defendants were going to rely on limitation and there was nothing before the court to suggest that the plaintiff could escape from it, the claim would be struck out.

[22] We were mindful of the facts that the plaintiff in its affidavits stated that the sum of money mentioned in the statement of claim was still claimable pursuant to the termination agreement. The law, however, is clear that any defect or omission in the statement of claim cannot be made good by affidavit evidence. In *United Malayan Banking Corpn Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1982] CLJ 547; [1982] CLJ (Rep) 358 at p. 360 Raja Azlan Shah Ag LP made the following observation:

> As we have said earlier the deposit of the shares as security was not disclosed in the Statement of Claim when the action was instituted nor was the fact that the security had been realised in a series of sales of the shares between January and September, 1980, and these matters were only disclosed for the first time in June, 1981 in the affidavit in support of the Order 14 Summons. This omission is surprising, to say the least, and we cannot but observe that any defect or omission in the Statement of Claim cannot be made good by affidavit evidence: *Gold Ores Reduction Co v. Parr* (1) where Mathew J., said that "it is most important that a defendant should know from the writ what the exact claim against him is.

[23] Under the circumstances we were of the view that the learned judge was right in her decision in not considering the explanations made by the plaintiff in its affidavits in support of the argument that the claim was not time barred.

[24] We had carefully considered the submissions made by the parties and we found no merit in the plaintiff's appeal. We could find no appealable error in the decision of the learned judge. We accordingly dismissed the appeal with costs, which was fixed at RM7,500.